

Dispute Resolution & Dispute Avoidance in COVID-19

24 September 2020

Jeremy Glover, Partner

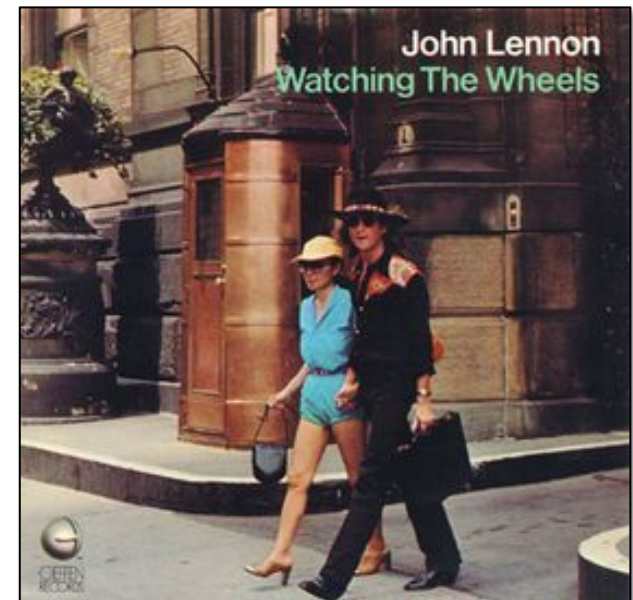
Dr Stacy Sinclair, Head of Technology & Innovation



Today's Agenda

- Dispute Resolution & Dispute Avoidance
 - What's happened and what's changed?
 - The use of technology to adapt and transform
 - Lessons learnt and top tips

*“People asking questions lost in confusion
Well I tell them there's **no problem, only solutions...**”*



<https://en.wikipedia.org>

The Effect of COVID-19 on Dispute Resolution

What's happened since March 2020?

- Solutions found and largely “business as usual”.
- Dispute resolution has carried on in all dispute resolution forums.
- New solutions and ventures for resolving disputes.
(ex: CIArb & CEDR Pandemic Business Dispute Resolution Service)
- Challenges as well as opportunities.

The Effect of COVID-19 on Dispute Resolution

What's changed since March 2020?

- Use of technology to enable both dispute resolution and dispute avoidance.
- Virtual hearings and meetings in mediation, arbitration and litigation are now familiar and widely used.
- Additional guidance and protocols published either to supplement existing ones or establish a clear framework
(ICC Guidance Note, CIArb Guidance Note, Seoul Protocol, etc)
- Cost savings
- Productivity and efficiency challenges

The Effect of COVID-19 on Dispute Resolution

Adjudication

- On the whole, little difference between now and pre-COVID.
- Some arguments over the timetable initially, but now, COVID on the whole cannot be an excuse to hide behind.
- ***Millchris Developments Ltd v Waters*** [2020] EWHC 1320 (TCC): the Judge refused to grant an interim injunction to prohibit Waters from commencing/continuing an adjudication.
- Significant shift away from hardcopy documents.

The Effect of COVID-19 on Dispute Resolution

Mediation

- Virtual mediations are now commonplace.
- Online platforms with break-out rooms.
- Many successful mediations as usual.
- Possible issues can include:
 - less human connection (or disconnection);
 - less ad-hoc discussions/interaction “on the fly”;
 - can feel too remote/distanced.

The Effect of COVID-19 on Dispute Resolution

Litigation | Arbitration

- Again, virtual hearings are now commonplace.
- Online platforms and providers cater for break-out rooms, transcription, etc.
- Electronic bundles
- Challenges as well as opportunities

The Effect of COVID-19 on Dispute Resolution

Litigation

- Principle of open justice is paramount.
- The week lockdown began:
 - 23 March 2020: Lord Chief Justice's message
 - 25 March 2020: Coronavirus Act 2020
 - 25 March 2020: New Practice Direction 51Y
 - 26 March 2020: Coronavirus Regulations 2020
 - 26 March 2020: Protocol Regarding Remote Hearings

The Effect of COVID-19 on Dispute Resolution

Litigation

- The court's approach: keep calm and carry on
- Protocol Regarding Remote Hearings: use of Skype for Business and other technology
- Reported Judgments in the TCC sees an increase in the past 6 months (April to September).

37 Judgments
2019

56 Judgments
2020

The Effect of COVID-19 on Dispute Resolution

A Judge's view on the future of litigation

Mrs Justice Finola O'Farrell DBE, 28 May 2020

- Success of co-operation and agility of the legal profession to adapt to new circumstances
- Need for evolution of legal processes to serve the interests of justice
- Use of technology to improve the efficiency and cost of legal proceedings without compromising justice
- Value of retaining physical hearings where appropriate

The Effect of COVID-19 on Dispute Avoidance

Projects, contracts and advice

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Communication | collaboration

Automation of contract formation | execution

Risk management and analysis

Workflow automation

Project and matter analytics

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The use of tech to adapt and transform

- Execution of contracts & deeds: eSigning
 - Electronic signatures are now valid
 - No provision for witnessing signatures electronically
 - Counterpart provisions can be included in the contract to assist
 - Datarooms - incorporation by reference?
 - Deeds: must be signed by two signatories:
 - two directors,
 - a director and company secretary, or
 - an individual director in the presence of a witness
 - Wills can now be witnessed by video / zoom / facetime etc... Does not apply for deeds.

The use of tech to adapt and transform

- Adapting in the Covid-19 environment (Phase 1)

Utilisation of technology (not innovation) to transform

- The need to adapt for survival inherently transforms (Phase 2)

Transformation of culture, mindset, workflows, etc

- Transformation then opens the door for innovation (Phase 3)



The use of tech to adapt and transform

- At the outset of the pandemic:
solutions to sort the obvious problem
- Now:
a return to finding the “problem” (use case)
before selecting the right solution?

- Technology is going to bring about a fascinating decade of change in the legal sector and transform our court system (*Online Courts and the Future of Justice*, Richard Susskind OBE)
- “infusion of data-enabled services” (*The Economist*, 11.04.2020)
- An opportunity
 - the use of technology to adapt and transform
 - not just about tech: **people | collaboration | process** needed to transformation and innovate



Dispute Resolution in the time of COVID: six months on

Jeremy Glover

Partner, Fenwick Elliott LLP

Member of Examiner's Board, Centre of Construction Law,
King's College London



The courts: a recap



Amendments to the Civil Procedure Rules 1998: Practice Direction PD51ZA

- Came into force on 2 April 2020 as a temporary measure;
- Currently in effect until 30 October 2020;
- Rule 3.8: increases the period by which parties can agree extensions to Directions without requiring the Court's permission from 28 to 56 days;
- Applications for longer extensions to be on paper and the parties may then apply for an oral (remote) hearing;
- The Courts take into account the impact of COVID-19 when considering applications for extensions of time, adjournments or relief from sanction;
- See *Stanley v London Borough of Tower Hamlets* [2020] EWHC 1622 (QB).

TCC in action

- April to September 2019 – 37 judgments reported on Bailli;
- Of which 14 were adjudication related;
- April to September 2020 – 55 judgments reported on Bailli;
- Of which 18 were adjudication related.

TCC in action: adjudication enforcement applications

The enforcement hearing

- Skype for Business.
- Invitations to join the meeting will be sent by email to all persons who have notified the Court as attending the remote hearing.
- 30 minutes before the hearing, the Claimant's legal representative will sign in and all attendees are obliged to attempt to sign in shortly thereafter, so that any issues with the connection can be addressed before the hearing is due to begin.
- The hearing will be recorded by the Judge's clerk.
- *“Although the hearing is being conducted remotely, the hearing remains a court hearing. The usual rules and formalities continue to apply. In particular, it is not permitted for any other party to record these proceedings, and breach of this rule amounts to a contempt of court.”*

The perils of virtual hearings



Gubarev & Anr v Orbis Business Intelligence Ltd & Anr, [2020] EWHC 2167 (QB)

A hearing:

“is not a live-streamed event unless the Court decides that it is both lawful and appropriate to make it such. It is not an event, even if it is taking place in court, that can be lawfully made open to any remote party that the participant parties, let alone the service provider, chooses to let in.”

Gubarev & Anr v Orbis Business Intelligence Ltd & Anr, [2020] EWHC 2167 (QB) **FENWICK
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Golden Rule:

- Read and follow the Tribunal Order, and make sure everyone knows.....

“The court accordingly rose to allow arrangements to be made. An associate took the judge’s closed laptop through to her room but, unbeknownst to the judge, the remote link to the court room remained open. The judge was therefore overheard having a private conversation on the telephone with her clerk about the Appellant by a number of people who still remained on the call.”

“During the course of that conversation, the judge’s frustration at what represented a further delay in a case which was already substantially overrunning its three week time estimate, manifested itself in a number of pejorative comments made by her about the Appellant including that she was pretending to have a cough and was trying ‘every trick in the book’ in order to avoid answering difficult questions.”

Golden Rule:

- Ensure your laptop and/or any phone or tablet are shut down too...your virtual app might still be open elsewhere, even if your laptop is shut down.

Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd [2020] EWHC 2308 (TCC)

“during a 10 minute mid-morning break in the course of the second day of Mr Lewin’s testimony (via video link on his tablet) Mr Lewin was overheard by Mr Frampton and a representative of SS’s solicitors having a private telephone conversation with Mr Bailey while the microphone on Mr Lewin’s tablet remained switched on.”

Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd [2020] EWHC 2308 (TCC)

“However, Mr Lewin accepted that he had telephoned Mr Bailey to “ask him how I was doing.” Initially, Mr Lewin said Mr Bailey had told him to hang up but then admitted that they did exchange further words and that he (Mr Lewin) had said “am I getting my knickers in a twist?...Sorry, just stick to meter readings do I?.” Mr Lewin then said that all Mr Bailey told him was “No, carry on”, before accepting that this did not make sense. When Mr Frampton later asked Mr Bailey about the conversation, he said he had only told Mr Lewin he was doing “Okay”.

Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd [2020] EWHC 2308 (TCC)

Golden Rule:

- When there is a break in proceedings in giving evidence, a witness should never speak to anyone else about their evidence.

Município De Mariana & Ors v BHP Group Plc & Anr [2020] EWHC 2471 (TCC)

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“By reason of the necessary social distancing restrictions imposed by the Covid 19 risk assessment, the Civil Justice Centre in Manchester, not without serious potential disruption to other court users, had been obliged to sacrifice no fewer than four of its largest courtrooms to facilitate access to the hearing which was being transmitted to relay courts via video link.”

Município De Mariana & Ors v BHP Group Plc & Anr [2020] EWHC 2471 (TCC)

“It is not without irony, in this context, that it was certain members of the claimants' legal team who, rather than paying attention to what Mr Hollander was saying on the Samarco issue, were running the risk of undermining his attempts to develop his oral arguments by preferring instead to run a persistent, noisy and undignified sideshow with those sitting on the other side of the court. At one stage, the background hubbub became so intrusive that I had to intervene. As the transcript reveals:...”

*Município De Mariana & Ors v BHP Group
Plc & Anr [2020] EWHC 2471 (TCC)*

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“MR JUSTICE TURNER: I think this might be better...for this matter to be determined by counsel and myself, not as between rival tribes on either side of the court. So I would prefer that people remained quiet whilst I'm listening to Mr Hollander's representations. Thank you”

Município De Mariana & Ors v BHP Group Plc & Anr [2020] EWHC 2471 (TCC)

Golden Rule:

- Poker-face;
- In a remote hearing, everyone can see all reactions of those on camera.

Economic impact on court claims

A decorative graphic on the right side of the slide consists of numerous teal-colored lines of varying lengths and orientations, creating a sense of movement and depth. The lines are arranged in a way that suggests a stylized, abstract shape, possibly representing a building or a landscape feature. The overall effect is modern and dynamic.

International Pipeline Products Ltd v IK UK Ltd [2020] EWHC 1602 (Ch)

Security for Costs:

“Thus the question is, will the company be able to meet the costs order at the time when the order is made and requires to be met? That is a question to be judged and answered as matters stand when the application is heard by the court, although the court will take into account and give appropriate weight to evidence about what is expected to happen in the interval before the costs order would fall to be met.”

International Pipeline Products Ltd v IK UK Ltd [2020] EWHC 1602 (Ch) **FENWICK
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- The courts are prepared to consider the economic impact of the COVID-19 pandemic;
- General evidence is not enough;
- Need specific evidence, relating to the company and industry in question;
- Is there a real risk of non-payment?

International Pipeline Products Ltd v IK UK Ltd [2020] EWHC 1602 (Ch)

“In my judgment, having reviewed the evidence before the court, I am unable to conclude at this point in time that the impact of Covid-19, any economic downturn, or the current state of the oil and gas industry are such as to detract from the Claimant's ability to pay the Defendants' costs so as to be satisfied that there is reason to believe that the Claimant will be unable to pay”

Broseley London Ltd v Prime Asset Management Ltd, [2020] EWHC 944 (TCC)

- Is there a risk of future injustice if the claimant becomes unable to repay the sum awarded by the Adjudicator and enforced by way of summary judgment at the end of the substantive hearing?
- *“Where the arguments are finely balanced...the court should lean in favour of enforcement of the judgment“*, (*Kersfield Developments Ltd v Bray & Slaughter Ltd*)
- Even if a party will probably be unable to repay the sum, a stay will not be granted if that party’s financial position is (i) similar to its position at the time when the contract was made; or (ii) is due in significant part to the failure to pay the Adjudication award.

Broseley London Ltd v Prime Asset Management Ltd, [2020] EWHC 944 (TCC)

- *“However, I must accept that the Covid-19 emergency measures might well have an impact upon whether all these projects will continue or commence, as the case may be.”*
- *“This makes the assessment of BLL's position more difficult, but I cannot say whether because of Covid-19 BLL will in due course be unable to repay the judgment sum. Given where the burden of proof lies, this makes PAML's position difficult.”*
- *“However, what I can say is that if PAML had moved with due diligence and in accordance with S & T, it could have had a result by adjudication of its alleged entitlements before the Covid-19 crisis blew up, and at a time when BLL would, on my findings, have been able to repay.”*

Force majeure: cases?



Paris Commercial Court and Court of Appeal

– 20 & 28 May 2020

- Electricité de France (“EDF”) & Total Direct Energie (“TDE”)
- Article 1218 of the French Civil Code, but Framework Agreement definition of *Force Majeure*:

“an extraneous, irresistible and unforeseeable event making it impossible to perform the parties’ obligations in reasonable economic conditions”.

- The Judge said:

“the spread of the virus is obviously extraneous to the parties, is irresistible and was unforeseeable, as proven by the sudden nature and extent of its appearance”.

In re: Hitz Restaurant Group

- *“Under Illinois law a force majeure clause will only excuse contractual performance if the triggering event cited by the nonperforming party was in fact the proximate cause of that party’s non-performance.”*
- Executive orders were the type of governmental action contemplated by the force majeure clause in that they hindered Hitz’s ability to perform.
- Mitigation: because the restaurant could still offer food for delivery or takeout, Hitz to pay 25% of the rent for April, May, and June.

Arbitration: virtual hearings



New London Court of International Arbitration(LCIA) Rules

- Take effect 1 October 2020;
- Changes made “*with a light touch*”: Paula Hughes QC, President of the LCIA;
- Article 4 reinforces the use of electronic communications;
- Article 19.2: “*The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the parties. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, duration, form, content, procedure, time-limits and geographical place (if applicable). As to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).*”

Dispute Boards: virtual site visits and hearings



Best Practice Guidelines for Virtual Dispute Board Proceedings

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- Site Visits and Hearings;
- Checklist and Guidelines;
- Contractual housekeeping;
- Dealing with documents and people!
- Practical advice on running hearings;
- To obtain a copy, email info@drb.org.



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Construction contracts



- UK Government Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency, May 2020:

“Responsible and fair contractual behaviour”


“It is recognised in particular that disputes, especially a “plethora of disputes”, can be destructive to good contractual outcomes and the effective operation of markets...the [UK] Government would strongly encourage parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes.”

- CLC Covid-19 Contractual Disputes and Collaboration Guidance: 14 July 2020:

JCT: *Principal Covid-19 guidance from
Government and Construction Leadership
Council*

“it is imperative that the contractual mechanisms continue to be followed to preserve each party’s rights and remedies under the contract. This includes complying with any notice requirements in respect of any potential delay and additional costs, as well as following risk management and early warning notice provisions.”

So is it (virtual) business as
usual ?

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Update on the operation of the Disclosure Pilot Scheme

- Released 22 September 2020;
- 85% of respondents thought the pilot had lead to the incurring of extra costs;
- 71% felt it had increased the burden on the court; and
- Only 6% believed it had successfully achieved a culture change.
- <https://www.judiciary.uk/announcements/update-on-the-operation-of-the-disclosure-pilot-scheme-disclosure-pilot/>

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Thank you.
Questions?

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